

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
Bright House Networks, LLC)	
)	CSR 6937-E
Petition for Determination of Effective)	
Competition in Various Florida Communities)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: March 1, 2007

Released: March 2, 2007

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Bright House Networks, LLC ("Bright House") has filed with the Commission a petition pursuant to Sections 76.7 and 76.905(b)(1) & (2) and 76.907 of the Commission's rules seeking a finding of effective competition in Crystal River (the "City") and unincorporated Hernando County, Florida (the "County") (collectively, the "Communities").¹ Bright House alleges that its cable system serving the communities are subject to effective competition pursuant to Section 623(a)(1) of the Communications Act of 1934, as amended ("Communications Act")² and therefore exempt from cable rate regulation because of competing service provided by two direct broadcast satellite ("DBS") providers, DirecTV, Inc. ("DirecTV") and DISH Network ("DISH"). Hernando County filed an opposition, to which Bright House replied.

II. DISCUSSION

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,³ as that term is defined by Section 76.905 of the Commission's rules.⁴ The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.⁵ Based on the record in this proceeding, Bright House has met this burden.

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors ("MVPD"), each of which offers comparable video programming to at least 50

¹See 47 C.F.R. §§ 76.7(a)(1) and 76.905(b)(1) & (2). The franchise area consists of Crystal River (FL0026) and unincorporated Hernando County (FL0641, FL0597).

²See 47 U.S.C. § 543(a)(1).

³47 C.F.R. § 76.906.

⁴47 C.F.R. § 76.905.

⁵See 47 C.F.R. §§ 76.906 & 907.

percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds 15 percent of the households in the franchise area.⁶ Turning to the first prong of the competing provider test, DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in a franchise area are made reasonably aware that the service is available.⁷ Bright House has not provided evidence of the advertising of DBS service in the news media serving the Communities, however, it argues that potential subscribers are aware of DBS because of prior Commission findings regarding the ubiquitous availability of DBS service; DBS providers' extensive national, regional, and local advertising; and marketing efforts through television, radio, internet, print media, and direct marketing.⁸ The two DBS providers' subscriber growth reached approximately 26.1 million as of June 2005, comprising approximately 27.7 percent of all MVPD subscribers nationwide; DirecTV has become the second largest, and DISH the third largest, MVPD provider.⁹ In view of this DBS growth data, and the data discussed below showing that more than 15 percent of the households in each of the communities listed on Attachment A are DBS subscribers, we conclude that the population of the communities at issue here may be deemed reasonably aware of the availability of DBS services for purposes of the first prong of the competing provider test. With respect to the issue of program comparability, we find that the programming of the DBS providers satisfies the Commission's program comparability criterion because the DBS providers offer at least 12 channels of video programming, including at least one non-broadcast channel.¹⁰ We find further that Bright House has demonstrated that the communities are served by at least two unaffiliated MVPDs, namely the two DBS providers, each of which offers comparable video programming to at least 50 percent of the households in the franchise area. Therefore, the first prong of the competing provider test is satisfied.

4. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise area. Bright House asserts that it is the largest MVPD in the Communities because Bright House's subscribership exceeds the aggregate DBS subscribership for those franchise areas.¹¹ Bright House derived the DBS subscribership based on an allocation methodology previously approved by the Commission.¹² Bright House initially determined the number of households in the franchise area based on data from the 2000 Census.¹³ Bright House then derived an allocation ratio by dividing the 2000 Census household figure by the Satellite Broadcasting and Communications Association's ("SBCA") aggregate household figure for the five digit zip code area covering all or part of the franchise area.¹⁴ The DBS subscriber count was then multiplied by the allocation ratio to determine the number of DBS subscribers allocable to the franchise areas, which was then divided by the 2000 Census household total

⁶47 U.S.C. § 543(1)(1)(B); see also 47 C.F.R. § 76.905(b)(2).

⁷See *MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

⁸See Bright House Petition at 4-5.

⁹*Twelfth Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, FCC 06-11 at ¶¶ 6, 13, 72-73 (rel. March 3, 2006).

¹⁰See 47 C.F.R. § 76.905(g). See also Petition at 6-7.

¹¹Bright House Petition at 8 and Exhibits A and C.

¹²*Id.* at 7-9 and Exhibit E; see, e.g., *In re Petition for Determination of Effective Competition in San Luis Obispo County, California*, 17 FCC Rcd 4617 (2002); *Fibervision, Inc. Petition for Determination of Effective Competition in Laurel, MT and Park City, MT*, 17 FCC Rcd 16313 (2002).

¹³Bright House Petition at 7-9 and Exhibit C.

¹⁴*Id.* Exhibit E.

to derive the total DBS subscribership.¹⁵

5. In opposition, Hernando raises several preliminary procedural objections. Hernando argues that the declaration supporting the Petition violates Section 1.16 of the Commission's rules because the declarant does not have personal knowledge that would make him competent to testify and the declaration is unsworn evidence.¹⁶ The County objects to consideration of the Petition's exhibits because each component is not authenticated and is therefore inadmissible as hearsay.¹⁷ The County alleges that the declaration is ambiguous because it cannot be determined if the facts include those in the exhibits.¹⁸ In addition, the County argues that the information contained in the Petition is hearsay because it is conclusory and lacks reliability.¹⁹ The County also objects to the SBCA data submitted by Bright House as inadmissible opinion and hearsay because there is no expert testimony to support the methodology used by Bright House.²⁰ The County requests that we disregard the Petition and exhibits because the declaration does not authenticate them.²¹ The County also requests that the Commission reject or dismiss the Petition because the footnote font is smaller than 12-point and the spacing between footnote lines may be smaller than the minimum allowed by Section 1.49(a) of the Commission's rules.²² The County claims that Bright House used the small footnote font and spacing for the purpose of evading the Commission's requirement that documents exceeding 10 pages contain a table of contents and a summary.²³ Alternatively, the County asks that we view the declaration as an evidence of Bright House's lack of credibility and refuse to accept as true any facts contained in the Petition that are not independently corroborated as evidence.²⁴ Substantively, the County argues that Bright House has failed to carry its burden because less than 15 percent of the population subscribes to DBS service.²⁵ To support this claim, the County argues that Bright House omitted two of the most densely populated areas, zip codes 34608 and 34609, which contain 24,000 households, from the household total.²⁶ The County therefore claims that the number of households in the County cannot be established and the Commission cannot determine whether the 15 percent DBS threshold has been reached.²⁷ In addition, the County claims that only 20 – 25 percent of the households in zip codes 33597 and 33523 are located in Hernando County. The County also submitted an affidavit from a planner who analyzes demographic statistics for the County on a monthly basis, based on estimates of population, dwelling units, and households using information from the County Planning Department map, County Building Division, and U.S. Census Bureau. The planner concluded that the number of households for the County exceeds 65,000.²⁸

¹⁵*Id.*

¹⁶Opposition at 1-2; 47 C.F.R. § 1.16.

¹⁷Opposition at 2.

¹⁸*Id.*

¹⁹*Id.*

²⁰*Id.* at 3.

²¹*Id.*

²²*Id.* at 4; 47 C.F.R. § 1.49(a).

²³Opposition at 4; 47 C.F.R. § 1.49(b) and (c).

²⁴*Id.* at 4.

²⁵*Id.* at 5-8.

²⁶*Id.*

²⁷*Id.*

²⁸Opposition, Exhibit A.

6. In reply, Bright House argues that the City's preliminary objections are inconsequential and inappropriate in the context of Commission review of effective competition petitions. Bright House notes that the Commission has repeatedly granted such petitions with the same supporting evidence and exhibits as submitted in this instance.²⁹ Finally, Bright House argues that it has satisfied the competing provider test because more than 15 percent of residents subscribe to DBS service. Bright House notes that it hired Media Business Corp. to identify zip codes for unincorporated Hernando County and it did not identify the two zip codes (34608 and 34609) that were excluded.³⁰ Bright House will concede that given the County's knowledge of its own communities, it has no reason to doubt the County's claim that these two zip codes should be included. Nevertheless, even when these two zip codes are added, Bright House contends, the DBS penetration exceeds 28 percent and thus the effective competition test is still met.³¹ Bright House rejects the County's argument that two other zip codes (33597 and 33523) should have been excluded because they only partially overlap the County.³² Bright House notes that the Commission's approved methodology for calculating DBS subscribership takes into consideration the fact that zip codes may cover a franchise area in whole or in part.

7. We reject the City's preliminary procedural objections. The declaration submitted in support of the Petition is consistent with Section 1.16 of our rules.³³ In addition, the certification requirement under Section 76.6(a)(4) of our rules requires that the signatory certify that the Petition is warranted by existing law or a good faith extension.³⁴ In this instance, there is both a declaration from the local Bright House official and a certification by the law firm representing Bright House. We deem this sufficient. We also reject the City's argument that the DBS penetration numbers submitted by Bright House are inadmissible hearsay. The Commission has repeatedly accepted SBCA's subscriber reports on behalf of the DBS providers in satisfaction of Section 76.907(c) of the Commission's rules.³⁵ Pursuant to this provision, cable operators may request subscriber information from competitors for effective competition purposes; however, this information may be limited to numerical totals.³⁶ Section 76.907(c) clearly contemplates that cable operators may rely on such information in petitioning the Commission for a determination of effective competition. We accept the SBCA Report submitted by Bright House as reliable evidence relating to the DBS penetration rate in the franchise areas.³⁷ We also reject the City's request to dismiss the Petition because the footnote font and spacing deviates slightly from Commission requirements. Although we expect filings to the Commission to be consistent with all of our rules, we believe dismissal in this instance would be extreme. Moreover, dismissal of Bright House's Petition for technical footnote spacing and font size errors would be needlessly burdensome to all parties involved

²⁹Reply at 1-2.

³⁰*Id.* at 2.

³¹*Id.* at 2-3.

³²*Id.* at 3.

³³47 C.F.R. § 1.16.

³⁴47 C.F.R. § 76.6(a)(4).

³⁵*See, e.g., In the Matter of Cablevision of Raritan Valley, Inc. et al.*, 19 FCC Rcd 6966, 6968 (2004); *In the Matter of Adelphia Cable Communications*, 20 FCC Rcd 4979, 4982 (2005); *In the Matter of MCC Iowa LLC*, 2005 WL 2513517 (2005); *In the Matter of CSC Holdings, Inc.*, 19 FCC Rcd 6891, 6892 (2004). Although SBCA has succeeded SkyTrends in providing the DBS penetration figures, the Reports are substantially the same and continue to provide accurate data for determining effective competition.

³⁶47 C.F.R. § 907(c).

³⁷We note that both of the DBS providers that provide the subscribership information used to generate the SBCA Reports are Commission licensees. As such, the Commission has the ability to sanction these providers should the information they provide to the cable operators pursuant to Section 76.907(c) prove to be misleading or inaccurate. 47 C.F.R. § 76.907(c).

because, ultimately, it would simply result in the refiling of a substantively identical petition by Bright House and a repetition of the pleading cycle that has already taken place in this proceeding. Future Bright House filings must comply with all of the Commission's requirements.

8. Finally, we reject the City's challenge to the use of the 2000 Census data figures as outdated. We have consistently held that the 2000 Census data is sufficiently reliable for effective competition determinations in numerous proceedings.³⁸ Nevertheless, the Commission has indicated that it "will accept more recent household data that is demonstrated to be reliable."³⁹ The County offers a more recent figure that comprises estimates of population, dwelling, and households in unincorporated Hernando County. We are unable to accept the County's revised figure, however, because it apparently includes the estimated number of total housing units in the unincorporated county area as well as building permits, rather than the number of households, *i.e.*, occupied housing units.⁴⁰ The competing provider test for effective competition set forth in Section 623(l)(1)(B) of the Communications Act expressly instructs the Commission to evaluate effective competition on the basis of "households."⁴¹ Accordingly, the County's figure is an inappropriate measure for effective competition purposes, and we rely instead on the 2000 Census data. Furthermore, even when Bright House included the additional 24,000 households in its calculation, there was no substantial change in the DBS subscribership rate; it still exceeds the 15 percent threshold by a substantial amount.

9. Based upon the aggregate DBS subscriber penetration levels, as reflected in Attachment A, calculated using Census 2000 household data,⁴² we find that Bright House has demonstrated that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in the Communities. Therefore, the second prong of the competing provider test is satisfied as to the Communities. Based on the foregoing, we conclude that Bright House has submitted sufficient evidence demonstrating that its cable system serving the Communities are subject to effective competition.

III. ORDERING CLAUSES

10. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by Bright House Networks, LLC **IS GRANTED**.

11. **IT IS FURTHER ORDERED** that the certification of Crystal River and unincorporated Hernando County to regulate basic cable service rates **ARE REVOKED**.

12. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.⁴³

FEDERAL COMMUNICATIONS COMMISSION

³⁸*In the Matter of Cablevision of Raritan Valley, Inc. et al.*, 19 FCC Rcd 6966, 6968 (2004); *In the Matter of Adelphia Cable Communications*, 20 FCC Rcd 4979, 4982 (2005); *In the Matter of MCC Iowa LLC*, 2005 WL 2513517 (2005).

³⁹*In the Matter of Adelphia Cable Communications*, 20 FCC Rcd 4979, 4982 (2005); *In the Matter of MCC Iowa LLC*, 2005 WL 2513517 (2005).

⁴⁰*See In the Matter of Marcus Cable Associates, LLC d/b/a Charter Communications, Inc.*, 17 FCC Rcd 16652, n. 19 (2002) (The term households means occupied housing units).

⁴¹47 C.F.R. § 543(l)(1)(B).

⁴²Bright House Petition at 7-9 and Exhibits B, C, D, and E; Bright House Reply at 2-3 and Exhibit A.

⁴³47 C.F.R. § 0.283.

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COMMUNITY SERVED BY BRIGHT HOUSE NETWORKS, LLC

Communities	CUIDS	CPR*	2000 Census Households ⁺	Estimated DBS Subscribers ⁺
Crystal River	FL0026	27.63%	1498	414
Uninc. Hernando County	FL0641 FL0597	28.63%	52200	14948

*CPR = Percent of competitive DBS penetration rate.

⁺See Bright House Petition at 7-9 and Exhibits B, C, D and E; Bright House Reply at 2-3 and Exhibit A.